Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

October 1 to December 31, 2006

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Production Summary

- The active inventory totalled 5,228 (31% over the target of 4,000 cases).

- Incoming appeals numbered 1,008; of these, 847 were appeals from WSIB decisions and 161 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 904 new appeals and 183 reactivated appeals recorded in the third quarter of 2006.
  - In the 4th quarter of 2005 the Tribunal recorded 912 new appeals and 188 re-activations.
  - In 2005, the weekly average of hearing ready appellants was 65. For Q4 2006, the weekly average of hearing ready appellants is 56. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,161; this includes 363 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 798 after hearing dispositions; of the after hearing dispositions, 765 followed from Tribunal decisions.

- The inactive inventory decreased by 67 cases to 4,235 (at the end of Q3-06, the inactive inventory was 4302 cases).

- In Q4 2006, 83% of final decisions were released within 120 days. Overall in 2006, 81% of final decisions were released within 120 days.

- The Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. Recent appointments and re-appointments will enable an increase in the hearing schedule to address the volume of cases.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the fourth quarter of 2006, the notice inventory included 1,420 dormant cases, the active inventory totaled 5,228 cases, and the inactive inventory totaled 4,235 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q1-2005	5156
Q2-2005	5351
Q3-2005	5378
Q4-2005	5288
Q1-2006	5319
Q2-2006	5417
Q3-2006	5493
Q4-2006	5228

B. Incoming Appeals

Period	Incoming Appeals
Q1-2005	1122
Q2-2005	1198
Q3-2005	1056
Q4-2005	1100
Q1-2006	1144
Q2-2006	1124
Q3-2006	1087
Q4-2006	1008

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2005	1136	456	680
Q2-2005	1048	416	632
Q3-2005	1016	479	537
Q4-2005	1190	465	725
Q1-2006	1146	435	711
Q2-2006	1131	477	654
Q3-2006	1084	426	658
Q4-2006	1161	363	798

D. Inactive Inventory

Period	Inactive Inventory
Q1-2005	4190
Q2-2005	4243
Q3-2005	4237
Q4-2005	4286
Q1-2006	4309
Q2-2006	4349
Q3-2006	4302
Q4-2006	4235

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q1-2005	1551	20
Q2-2005	1506	-45
Q3-2005	1519	13
Q4-2005	1519	0
Q1-2006	1486	-33
Q2-2006	1381	-105
Q3-2006	1308	-73
Q4-2006	1420	112

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Community Activities

In early January, Dan Revington, General Counsel, was a guest speaker at the University of Montreal for the Program of Insurance Medicine and Medicolegal Expertise. The session was conducted by Dr. Francois Sestier of the Faculty of Medicine of the University of Montreal and Dr. Michel Lacerte of the Faculty of Medicine of the University of Western Ontario.

Marvin Goldstein, Counsel, Information Services Group, will speak to the Office of the Employer Advisor at their January staff training session about processing Tribunal decisions after they are released; the discussion will include how cases are selected as noteworthy and for the Reporter. Sophie Martel, Vice-Chair, will speak about revenue issues.

Also in 2006, the Criminal Injuries Compensation Board and staff involved with the Human Rights Tribunal visited to learn about the WSIAT's case management system and copying capabilities.

Judicial Review Activity

The Tribunal's twenty-first anniversary passed in October of 2006 with the Tribunal's record intact – that is, no decision of the Tribunal had ever been successfully overturned on judicial review. However, as noted below a Divisional Court decision released in November 2006 did quash a Tribunal decision. A Notice of Motion for Leave to Appeal that decision has been filed with the Court of Appeal.

The status of applications for judicial review involving the Tribunal for the final quarter of 2006 are set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

Judicial Reviews

1. Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)

A worker had a back injury in April 1979. From 1979 until 1990, there were no records of any back complaints in the Applicant's medical charts. In late 1991 he suffered from an episode of back pain. In 1993 he alleged to the Board that his back problems were related to the 1979 accident 14 years earlier. A report from the worker's specialist supported a link between the accident and the problems.

The issue for the Vice-Chair was one of medical continuity, compatibility and causation. The Vice-Chair concluded that the 1979 accident did not cause or contribute to the symptoms after 1990, and denied entitlement.

The judicial review was heard in Sudbury on October 5. A Divisional Court panel of Smith, Kent and Pierce reserved its decision. On November 15 the Divisional Court released its decision granting the application for judicial review and quashing *Decision 433/99* and *Decision 433/99R*.

The Court held that there were several errors in the Tribunal's fact finding which, although taken individually were small, the cumulative effect of the errors was at odds with the Tribunal's conclusion. While acknowledging the standard of review was patent unreasonableness, the Court held that the Tribunal's findings of fact were erroneous, and a rational conclusion cannot be based on erroneous fact finding.

A Notice of Motion for Leave to Appeal the Divisional Court decision was served on November 30, 2006.

2. Decision No. 855/03 (November 15, 2005)

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Tribunal has filed its factum. The Board successfully brought a motion to intervene in the judicial review. It is anticipated this case will be heard in January of 2007.

3. **Decisions Nos. 653/99 (November 15, 1999) and 653/99R (January 21, 2002)**

The Tribunal denied the worker's appeal for an increased future economic loss award and for non-economic loss, on the grounds that the worker's medical condition was caused by non-compensable factors. The worker delayed more than three years before bringing the application for judicial review.

Counsel for the employer moved to quash the judicial review for delay. After discussion between all parties, counsel for the worker proposed that the judicial review be dismissed on consent. All parties consented to dismiss the judicial review without costs.

4. **Decisions Nos. 1402/03 (January 19, 2004) and 1402/03R (August 19, 2005)**

An injured worker had his benefits based upon the actual wages his employer paid him. The worker alleged that the wages that were paid were too low, and that under the collective agreement he should have been paid by the employer at a higher rate. The Tribunal held that it did not have the jurisdiction to interpret a collective agreement, and whether the correct wages were paid was a Labour Relations matter. The worker had not sought a remedy under the collective agreement. The Tribunal found that the amount the worker was paid was the amount to be used in the calculation of benefits, and the Tribunal did not have the jurisdiction to consider what should have been paid.

The worker commenced an application for judicial review of the Tribunal's decisions. At the end of 2006 the Tribunal was preparing a responding factum.

5. **Decisions Nos. 2282/05 (May 17, 2006) and 2282/05R (August 29, 2006)**

A chambermaid at a motel claimed that she was sexually assaulted by K, one of the owners of the motel. The motel was owned by a partnership. She brought an action against the owners. The defendants applied to determine whether the plaintiff's right of action was taken away.

Although the defendants denied the allegations, they agreed for the purposes of the Tribunal application that the allegations were true.

The Panel found the right of action was taken away against all the defendants, except K. The plaintiff was a worker of a Schedule 1 employer, and the sexual assaults were accidents within the meaning of the Act. However the assaults by K were outside the scope of employment, and he could not be considered to be

an employer at the time of the assaults. The Act did not intend to protect employers from actions for deliberate assaults against workers.

A request for reconsideration was denied. The defendants have brought an application for judicial review. At the end of 2006 the Tribunal was waiting for the Applicant's factum.

Kamara v Workplace Safety & Insurance Appeals Tribunal

An injured worker's appeal was denied by a decision of a panel of the Tribunal. The worker, who is self-represented, commenced an action to sue the Vice-Chair of the Panel for a million dollars. The grounds for the action were not clear.

The Tribunal brought a motion to strike the worker's action. The motion was heard on October 11. Justice Sachs granted the motion on the grounds the Vice-Chair was acting within his jurisdiction under the Act, and hence was protected by the statutory immunity in s.179(1).

Recent Decisions

Occupational Disease

Decision No. 401/06 discusses benefit entitlement for a surgery arising from occupational disease in unusual circumstances. Following workplace screening, a miner was diagnosed with lung cancer, for which he underwent surgery and had a portion of his lung removed. Pathology found no malignancy. The worker did not suffer from lung cancer but had a benign disease. Subsequently, the worker died of a ruptured aortic aneurysm. The worker's widow sought entitlement to benefits for the surgery and death benefits. The Board denied those benefits and the widow appealed to the Tribunal.

While the case did not fit within the usual definition of occupational disease, the statutory definition also considers an occupational disease to include a condition that requires a worker to be removed from exposure to a substance because the condition may be a precursor to an occupational disease. The Panel found that the worker's condition fit within the definition since the worker had severe dysplasia, which led doctors to believe he had an occupational disease (lung cancer) or a precursor to an occupational disease (severe dysplasia). The surgery required removal from the workplace at least from the surgery date until the recovery date. In these unique circumstances, the Panel found entitlement for the surgery. His death however, was not the result of the surgery. Entitlement to death benefits was denied.

NEL Awards – Continuing Developments

Decision No. 1357/05 marks an important development in the application of Board Policy and calculating Non Economic Loss (NEL) awards for workers who have NEL awards in different claims. Both WSIA and the pre-1997 Act require the application of the AMA Guides. There is no legislative provision regarding the effect of pre-existing impairments on NEL awards. The AMA Guides are also not conclusive on the effect of pre-existing impairments. Thus, the Board is left with considerable discretion in addressing how to deal with workers with more than one NEL award. In its discretion, where workers have more than one NEL award, the Board combines the NEL awards to reflect a percentage impairment of the whole person. The Board does so by application of the combined values chart in the AMA guides. The result is usually a small reduction in the total of the awards.

In this case, the worker had 4 injuries and 4 NEL awards. A right arm (5%), a left elbow (6%), a left knee (14%) and low back (16%). Applying OPM Document #18-05-05, the Board reduced the left knee rating from 14% to 12% NEL and the right arm from 5% to 3% when combined with other awards. The worker took issue with the application of the combined values chart, arguing that an earlier policy, OPM Document #05-06-07, applied which did not require combining.

The Vice-Chair noted that OPM Document #18-05-05 when read as a whole with policy statement and guidelines, together, provides for use of the combined values chart with pre-existing NEL awards. The result is within the Board's discretion and is not inconsistent with the legislation. Further, it was the only policy addressing the combination of NEL awards with pre and post 1998 accidents; it was the applicable policy in this case for the right ankle and left knee awards. The Vice-Chair agreed with the presumption against retroactivity of Board policy. However, OPM Document #18-05-05 did not retroactively set out a different method of calculating NEL awards for post-1990 impairments. OPM Document #18-05-05 did not change the way the Tribunal unanimously decided NEL awards arising from different claims.

In the circumstances, the Vice-Chair found the Board appropriately used the combined values chart and the appeal was dismissed.

S. Adams
WSIAT
January 2007